Due: Friday 16th February 2024

Re: Exposure Draft – Aged Care Bill 2023

Submitted via Email: AgedCareLegislativeReform@Health.gov.au

The Public Sector Residential Aged Care Leadership Committee welcomes the opportunity to present this submission, enabling feedback on the Aged Care Bill 2023 (**Exposure Draft**)

About the Public Sector Residential Aged Care Leadership Committee (PSRAC LC)

Public Sector Residential Aged Care (PSRAC) is a priority service in Victoria, supporting approximately 5,500 residents in more than 180 Victorian government aged care facilities. To ensure older Victorians receive the best possible care, the Victorian Government established the PSRAC LC in 2012 as an advisory body comprised of Executive Directors and Directors of Nursing from the state-wide public sector Director of Nursing committees - metropolitan, regional, and small rural.

The purpose of the PSRAC Leadership Committee is to represent Victorian public sector Director of Nursing Groups and consumer interest while offering a mechanism for providing leadership, advocacy, promotion of quality care, influencing decision making and creating an avenue for information exchange with the Victorian Department of Health, Safer Care Victoria, Health sector unions, education institutions and consumers. We are a body who are positioned to advocate, and voice matters specific to public sector aged care residents, staff, and providers.

About Victorian Public Sector Residential Aged Care (PSRAC)

The Victorian public health system operates 9% of residential aged care beds across Victoria, consisting of 174 facilities (54 low care facilities and 120 high care), totaling approximately 5,500 beds across the state. Nine of the 174 sites are multi-purpose services and approximately 80% of PSRACS are in rural and regional areas.

In several rural areas, PSRACS are often the only aged care provider in the town, have a significant community benefit and play an important economic role. In metropolitan areas, many PSRACS facilities are specialist aged person mental health units. This is unique to Victoria, and it is interesting to note that the specialty of aged persons mental health is not recognized in the AN-ACC specialties. Public Sector Residential Aged Care in Victoria employs approximately 10,000 staff.

It is believed that the cohorts in Victorian PSRACS are among the most complex and vulnerable people requiring care for older persons. This is a result of clients with complex and challenging comorbidity or social circumstances, finding it difficult to be accepted in the private sector. The acuity of Victorian aged care residents assessed as 'high' for Complex Health Care grew from 12.7% in 2008-09 to 90.4% in 2019-20, outlining the complex skill set of public sector residential aged care staff.

Feedback on the Exposure Draft – Aged Care Bill 2023

Thank you for the opportunity to respond to the Exposure Draft. In formulating our response, we have considered the guidance material and consultation paper drafted by the Department of Health and Aged Care (Department) and the Aged Care Quality and Safety Commission (ACQSC).

The PSRAC LC considers the Exposure Draft a welcome step forward in the development of a legal framework that supports the Commonwealth's strategy to improve aged care services in Australia, guided by the recomendations from the Royal Comission into Aged Care Quality and Safety (Royal Commission). The Exposure Draft demonstrates a human rights based approach that focusses on older people, their rights and dignity, and ethical, safe, high quality care.

The PSRAC LC note the Exposure Draft contains several placeholder provisions and references new Rules which are yet to be released. We consider that a comprehensive review of the Exposure Draft cannot be undertaken without this further information. In addition, we consider there is opportunity to structure the Exposure Draft to improve its navigability and clarity. For example, the reference to *'the rules made for the purposes of section 106'* in section 17(4) should refer to the Rules in relation to restrictive practices.

The PSRAC LC are concerned about the economic forecasting and viability of administering the proposed Act. The Exposure Draft demonstrates an increased regulatory burden for providers which will necessarily, increase the cost of regulation. We are concerned that this increased regulatory burden will detract from the time and funds available to deliver care.

In addition to our general comments above, we take the opportunity to address three specific areas:

- Chapter 3, Part 5 - Statutory Duty and Compensation
- Chapter 1, Part 4 – Supporters and Representatives
- Chapter 2 Entry to the Commonwealth Aged Care System

CHAPTER 3, PART FIVE (5) STATUTORY DUTY AND COMPENSATION

The proposed statutory duty and compensation pathways address Recommendation 14 of Royal Commission[1]. We note recommendation 14 did not propose a criminal offence. The PSRACS LC are concerned about this addition to the Exposure Draft for the following reasons:

a. We acknowledge the intention of the statutory duties and compensation pathways is to promote trust for the community and users of aged care services, the exposure draft has shifted the balance of building or restoring trust and respect in Australian health care workers and services, to a punitive model.
b. It is inconsistent with the principals of Statutory Duty of Candour and Open Disclosure [2]. For example, statutory duty of candour promotes trust and rectification where there has been a wrong, and the Quality Standards require the provider to adopt an open disclosure approach when there has been a wrong**.** We are concerned that the pathway may create apprehension in this practice for fear of prosecution.
c. It is a potential duplication or overlap of Part 10 of the Public Health and Wellbeing Act [3]. The pathway could be seen a duplication of the Wrongs Act 1958 [4], and is a potential duplication or overlap of the powers and functions of the Australian Health Practitioners Registration Agency.
d. It is anticipated to have a perverse impact on an already strained aged care leadership, senior manager and director workforce causing additional shortfalls. We expect fiscal blowouts driven by increased wage demand, probable increases professional indemity insurance premiums and claims due to the additional risk for “responsible persons”

[1] Aged Care Royal Commission Final Report: Recommendations
[2] Statutory Duty of Candour and protections for SAPSE reviews | Safer Care Victoria
[3] Public Health and Wellbeing Act 2008 (legislation.vic.gov.au)
[4] Wrongs Act 1958 (legislation.vic.gov.au)

such as managers and individuals in "responsible" positions.

e. If the statutory duty and compensation pathway is adopted, we suggest it will be strengthened if it includes all levels of workforce, not only the list of responsible persons as outlined on page 20 of the exposure draft.
f. Finally in light of Oakden, as one key example, which was accredited despite such failures by relevant govenrnment authorites [5], it is disappointing to see crown immunity drafted into the Bill.

We consider that, as currently drafted, it is unclear how the statutory duty and compensation pathway provisions in the Exposure Draft will interact with other compensation mechanisms. This involves the interface between it and the *Health Legislation Amendment (Quality and Safety) Act 2022* (Vic), the amended the *Health Services Act 1988* (Vic), the *Ambulance Services Act 1986* (Vic), the *Mental Health Act 2014* (Vic), the *Public Health and Wellbeing Act 2008* (Vic), and the *Health Complaints Act 2016* (Vic). The following provisions came into effect on 30 November 2022, with the statutory duty of candour and associated Serious Adverse Patient Safety Event (SAPSE) review process.[6]

Amendments to the *Health Services Act 1988* (Vic) introduced protections for adverse event reviews (SAPSE review). As explained in the Safer Care Victoria reference, if the provisions within Division 8 of Part 5A of the *Health Services Act 1988* (Vic) are followed, and a SAPSE review panel is formed, the review process including any documents or reports created as part of the SAPSE review, will be protected and not admissible in legal proceedings. There are also relevant protections for SAPSE review panel members and participants of the SAPSE review. [7] This seems contrary to the Exposure Draft.

In our September submission that was feedback on the fundations of the new Act, it was suggested that expanding the Statement of Rights would negate the need for compensation pathways in the Exposure Draft. Such an expansion could state that "*People living in a residential health care setting maintain the right to have full and effective use of his or her personal, civil, legal and consumer rights".* This inclusion will remind older vulnerable persons, their familes and representatives, supporters and consumers of services, that they have the right to compensatory action under current laws.

We are concerned about the inclusion of provisions which prevent prosecution of the Crown for contravention of the Exposure Draft (see sections 222 amd 232 of the New Act). Noting that Australia's aged care system has experienced significant failures as seen with the Oakden example, we recommend that the Department give further consideration to whether these provisions are appropriate.

The PSRACS LC supports enforcement action in circumstances where there are contraventions of provider obligations and there is a risk of harm to individuals. However, PSRACS is concerned that the statutory duties and compensation pathways as currently formulated will result in increased litigation which in turn, will increase costs for providers and detract from funds available for the delivery of frontline care services.

It is understood that at times there are grounds for adversarial action, such as in the example cases in the UK where direct care workers can be prosecuted successfully and where providers are held accountable in gross examples of misconduct [8]. It is highlighted in the UK that "it is an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully neglect that individual." Further, "it is worth highlighting that this offending relates to 'wilful' neglect carried out deliberately, not incidents of genuine error or accidental in nature"[9], where the New Zealand recommendations for no – blame and learning from incidents is favoured.

[5] Oakden: A Shameful Chapter in South Australia's History | Independent Commission Against Corruption SA (icac.sa.gov.au)
[6] Statutory Duty of Candour and protections for SAPSE reviews | Safer Care Victoria
[7] Statutory Duty of Candour and protections for SAPSE reviews | Safer Care Victoria
[8] The rise of criminal prosecutions in the health and social care sector (wardhadaway.com)
[9] The rise of criminal prosecutions in the health and social care sector (wardhadaway.com)

CHAPTER 1, PART FOUR (4) – SUPPORTERS AND REPRESENTATIVES

The PSRAC LC supports the introduction of the role of supporters and representatives in the Exposure Draft.

However, we note that the inconsistency of language across law and policy may cause confusion for staff. We note that similar roles exist under state-based laws (through guardians, powers of attorney, nominated persons under mental health laws and other substitite decision makers) and the NDIS system (nominees). We are concerned that, practially, the operation of these roles will cause confusion for staff, care recipients and their advocates and consider it will be necessary to clearly establish when each role operates. For example, it is not clear what is a medical decision that may be made pursuant to, for example, a guardianship appointment, versus what is a clinical care decision under the New Act which may only be made by a representative.

The Victorian public sector residential aged care providers continue to advocate for the harminisation of standards and obligations across State and Commonwealth laws. The Department should ensure that it considers the implications of the Exposure Draft on state-based laws and ensure consistency, particularly in the language used, with state-based laws. This will ensure usability for staff who often manage complex clinical and family dynamics. Ensuring clarity and consistency will also reduce the need for staff to rely on the assistance of legal counsel (which could otherwise be an additional cost for providers).

FEEDBACK RE: CHAPTER 2 ENTRY TO THE COMMONWEALTH AGED CARE SYSTEM

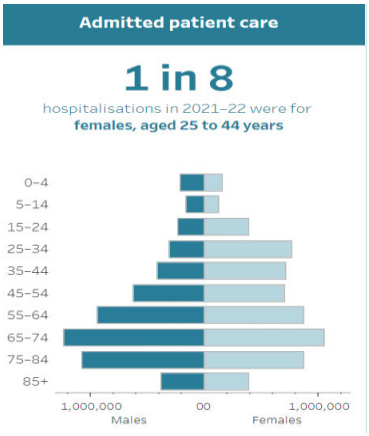
The Australian Institute of Health and Welfare - GEN data demonstrates very few people under the age of 65 use residential care services.[10] We therefore consider that it is appropriate to set a minimum entry age of 65 for the general population and 50 years of age for those who have associated risk factors such as homelessness or have an ATSI background. We agree that a person who is less than 65 years of age should be able to access funded aged care services where that person meets certain health criteria and that they provide their consent to access services.

However, in revising the Exposure Draft, the Commonwealth Government should consider the current barriers in the aged care system that prevent older people from accessing funded aged care services and are, therefore, left in the acute healthcare system. This is an inappropriate use of public health resources which generates increases to state health care costs.

Currently, unnecessarily complex and lengthy referral pathways, limitations on transitional care programs eligibility criteria, and problematic consent, care and financial assessment processes delay a person's ability to access aged care services. This issue is exacerbated for smaller rural settings who may not have sufficient aged care services leaving older people in acute beds which compounds discharge times.

The below figure taken from the Australian Institute of Health and Welfare clearly demonstrates the large number of people over the age of 65 who were admitted into the hospital system in 2021-2022. The figure illustrates the risk of acute bottlenecks and the opportunity to work toward expediating referral and assessment pathways for aged care services. From our experience, a patient who remains in the healthcare system despite being medically stable causes a congestion of emergency services and patient flow.

[10] People using aged care - AIHW Gen (gen-agedcaredata.gov.au)



([11])

Noting that the Statement of Principles seeks to promote a person-centered and sustainable aged care system, the Department must consider the cost associated with the delay in older people accessing funded aged care services. There is a considerable difference between AN ACC funding and an overnight stay in hospital using the NWAU weightings. From a cost perspective, the consequence of this is that State's costs are increased.

CONCLUSION

The PSRAC LC welcomes the Exposure Draft as the Department continues to work towards a new Aged Care Act. Although we consider that the Exposure Draft has many positive elements, in our view, the Department should consider the complexity for providers working across multiple sectors. The Department should also consider the operation of the New Act in the context of other State and Commonwealth Laws, to ensure consistency and coherence.

Further consideration to adding a human right that highlights a person's ongoing right to exercise their full civil and legal rights, regardless of their residential address could mitigate the need to design the new Duty of Care Compensatory pathway.

Finally, in revising the entry assessment, the Department should consider the broader system with which individuals interact and seek to ensure that barriers to entry are addressed insofar as possible in the New Act.

Thank you for considering our submission and please do not hesitate to contact us should you wish to discuss our submission further.

Yours sincerely,

[redacted]

Katrina Sparrow

Chair - PSRAC Leadership Committee
Director of Clinical Services
Kerang District Health
[redacted]

[11] Admitted patients - Australian Institute of Health and Welfare (aihw.gov.au)